80-1094

No.

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BURLINGTON NORTHERN INC., a corporation,
Petitioner,

vs.

EDWARD L. FLANIGAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner applies for a Writ of Certiorari and in support of its application states:

QUESTION PRESENTED FOR REVIEW

The question in this case is whether the Court of Appeals erred in ignoring the dictate of the United States Supreme Court in *Norfolk and Western Railway Company* v. *Liepelt* by refusing to remand this case for new trial as a result of the trial court's failure to give the *Liepelt* income tax instruction when *Liepelt* was decided while the appeal of this case was pending.

This issue involves the basic proposition of whether an appellate court is required to apply a new ruling by the United States Supreme Court to a case on appeal at the time of the Supreme Court's decision.

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EDWARD L. FLANIGAN,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JURISDICTION

Review is sought of the decision of the United States Court of Appeals for the Eighth Circuit, filed September 4, 1980 denying the appeal of petitioner, Burlington Northern, Inc. The decision of the Court of Appeals is set forth in the Appendix as Exhibit "A", appendix pages A-1-A-19. The order of the Court of Appeals for the Eighth Circuit denying the petition for rehearing en banc filed by the petitioner is set forth in the Appendix as Exhibit "B", appendix page A-20.

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1) and this Court's rules 17(1)(a) and 17(1)(c).

In the instant case the United States Court of Appeals for the Eighth Circuit has rendered a decision in conflict with decisions of the United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Fifth Circuit. The conflict involves the issue of whether *Norfolk and Western Railway Company* v. *Liepelt,* 62 L. Ed. 2d 689, 100 S. Ct. 755 (1980) requires reversal of the trial court judgment for the failure of the trial court to give an instruction on the non-taxability of a jury award.

STATUTES INVOLVED

45 U.S.C. Section 51, which provides:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

26 U.S.C. Section 61(a), Int. Rev. Code of 1954, Section 61(a) which provides:

> "[G]ross income means all income from whatever source derived . . ."

26 U.S.C. Section 104(a), Int. Rev. Code of 1954, Section 104(a)(2), which provides:

> "Except in the case of amounts attributable to (and not in excess of) deductions allowed under Section 213 relating to medical, etc., expense for any prior taxable year, gross income does not include . . .(2) the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness . . ."

STATEMENT OF THE CASE

Respondent, Edward L. Flanigan, an employee of the petitioner, Burlington Northern, Inc., brought suit pursuant to 45 U.S.C. Section 51, commonly referred to as the Federal Employer's Liability Act, in the United States District Court for the Eastern District of Missouri for a personal injury received while working for the railroad. Flanigan's injury was the traumatic amputation of a leg, an injury alleged to be permanently disabling. The jury returned a verdict in favor of Flanigan and against Burlington Northern, Inc. in the sum of $500,000.00 and judgment was entered thereon.

During the instruction conference the railroad submitted its tendered instruction No. 2, which was refused by the Court. (Transcript of Trial, p. 611) The instruction, included in the Appendix as Exhibit "F" states as follows:

> "You are instructed that any award made to plaintiff as damages in this case, if any award is made, is not subject to state or federal income taxes, and you should not consider such taxes in fixing the amount of any award made plaintiff, if any you make." (Court of Appeals Designated Record p. 35)

The post-trial motion of the railroad, paragraph 20, raised the error of the trial court in refusing the instruction. By Court Order dated July 18, 1979 the post-trial motion was denied.

That Order is included in the Appendix as Exhibit "D". (Court of Appeals Designated Record p. 54)

Burlington Northern's brief on appeal, pages 41-43 of which are included in the Appendix as Exhibit "G", preserve the issue of the trial court's reversible error in refusing the tendered instruction that an award made to Flanigan was not subject to income taxes. Between the time of trial of the case in the United States District Court for the Eastern District of Missouri and oral argument before the United States Court of Appeals, Eighth Circuit, the decision of the Supreme Court of the United States in *Norfolk and Western Railway Company* v. *Liepelt, supra,* was rendered. The Court of Appeals, realizing the potential effect of the *Liepelt* decision on its ruling in this case, ordered supplemental briefs. The order for supplemental briefs was made at the time of oral argument of this case before the Eighth Circuit on March 12, 1980. Pursuant to that order the supplemental brief of appellant was filed to address the issue of whether the decision of the Supreme Court of the United States in *Norfolk and Western Railway Company* v. *Liepelt,* required remandment of this case for a new trial.

The Court of Appeals rendered its opinion in this case on September 4, 1980, affirming the judgment of Flanigan against Burlington Northern (Appendix, Exhibit "A"). Burlington Northern filed a petition for rehearing *en banc* which was denied by Court Order dated October 16, 1980 (Appendix, Exhibit "B").

REASONS FOR GRANTING THE WRIT

This case is of special importance beyond its importance to the parties hereto, because it involves an issue which frequently arises in appeals, an issue which must be resolved uniformly in the courts in order to avoid chaos in the process of judicial review. That issue is whether a federal appellate court is required to apply a decision handed down by the United States Supreme Court to a case that is pending before the appellate court at the time of the Supreme Court's decision. The issue has far-reaching consequences and will lead to confusion and lack of predictability in the process of judicial review if it is not decided uniformly. The Court of Appeals for the Eighth Circuit in this case has departed from the long-standing rule that the appellate court *is* required to apply such new Supreme Court decisions to pending cases and has created a conflict between the Supreme Court and the fourth and fifth circuits on one hand, and the eighth circuit on the other, as to how the Supreme Court's decision in *Norfolk and Western Railway Company* v. *Liepelt* must be applied by the federal courts. If the decision in this case is allowed to stand, it can be cited by litigants *ad infinitum* for the erroneous proposition that an appellate court is *not* required to apply new case law decided while an appeal is pending.

Liepelt holds, in a case arising under the Federal Employer's Liability Act, that it is reversible error not to give a jury instruction that any award given to the plaintiff is not subject to income taxes. The Court of Appeals ignored the Supreme Court's mandate in *Liepelt* in failing to reverse and remand this case for trial because of the trial court's refusal to give the income tax instruction.

The Appellate Court answered the threshold question correctly in holding that it must apply the Supreme Court's mandate in *Liepelt* in the present case when the present case was on appeal at the time *Liepelt* was decided. *United States* v. *Schooner*

Peggy, 5 U.S. (One Cranch) 103 (1801) requires the appellate court to apply the change in the law as announced in *Liepelt* to pending cases rather than merely prospectively, as is shown in the denial of plaintiff's petition for rehearing in *Liepelt,* 64 L. Ed. 2d 250, 100 S. Ct. 1667 (1980). The petition for rehearing contended that the majority opinion should operate only prospectively. The petition argued at p. 7:

> "The ruling of the Court should be prospective only.
>
> The Court may take judicial notice that literally hundreds, if not thousands, of FELA cases are currently pending in various jurisdictions throughout the United States. Undeniably those cases were tried in reliance upon the rule prevailing in a majority of jurisdictions.
>
> If the instant opinion stands in its present form, the decision will force remands of all of those cases. The expense and inconvenience to innumerable parties will be enormous.
>
> In these circumstances respondent respectfully suggests that the Court apply the rule of *Great Northern Ry. Co.* v. *Sunburst Oil Co.,* 287 U.S. 358, 53 S. Ct. 145 (1932), and *Linkletter* v. *Walker,* 381 U.S. 318, 85 S. Ct. 1731 (1965). As noted in *Linkletter,* the prospective ruling should not even apply to the immediate parties before the Court, otherwise the ruling will govern all other cases pending on appeal (381 U.S. at 621-622)."
>
> (Appendix, Exhibit "I")

In denying the petition, the Supreme Court put to rest all arguments for only prospective application of *Liepelt.*

The Court of Appeals further held that *Liepelt* required a holding that it was erroneous for the trial court to fail to instruct on the non-taxability of the award in the instant case. At this juncture the Court should have simply followed *Liepelt* and

reversed the decision of the trial court and remanded for a new trial on the issue of damages. The error of the Court of Appeals is in its efforts to find an exception or a loophole that would allow it to recognize the *Liepelt* decision while not applying it to this case. First, the Court intimates that the *Liepelt* decision was based on a combination of errors including the failure to allow the defendant Railroad to prove through its economist the projected net earnings after taxes and the failure to give the instruction on non-taxability. The *Liepelt* decision does not stand for this proposition at all. *Liepelt* holds, 62 L. Ed. 2d at p. 696 with reference to the income tax instruction:

> "We hold that it was error to refuse the requested instruction in this case. That instruction was brief and could be easily understood. It would not complicate the trial by making additional qualifying or supplemental instructions necessary. It would not be prejudicial to either party, but would merely eliminate an area of doubt or speculation that might have an improper impact on the computation of the amount of damages."

This language clearly holds that it was reversible error to refuse the requested instruction of non-taxability. There is absolutely no suggestion that reversal would not have been allowed absent the issue of the failure of the Court to allow testimony by the economist.

Second, the appellate court invokes a "harmless error" rule for jury instructions, which puts the burden on the appellant to establish the prejudicial effect of the trial court's refusal to give the requested instruction. If *Liepelt* was meant to stand for the proposition that the failure of a court to give the instruction on non-taxability of jury award could be construed as "harmless error", the decision would have so stated. It does not. To impose this new requirement on the railroad of establishing the prejudicial effect of the trial court's refusal to give the instruction is contrary to *Liepelt*. As a matter of fact, it flies squarely

in the face of *Liepelt*. *Liepelt* was decided by the Supreme Court for the purpose of determining whether it was error for the trial court to refuse to instruct the jury that an award of damages would not be subject to income taxation in a Federal Employer's Liability Act case. As there were different rulings by different courts concerning the issue of whether or not this instruction should be given, the Supreme Court utilized the *Liepelt* case to produce a definitive ruling that failure to give the instruction on non-taxability of the jury award was reversible error. This clear cut holding is designed to produce uniformity among the courts on this issue. The decision in the instant case negates this effort to create uniformity in the application of the Federal Employer's Liability Act among the various courts which must interpret the statute. The decision trumpets a return to a hodgepodge of individual decisions, certain to be contradictory of each other. Such was not the intent of *Liepelt*.

The holding in the instant case is in direct conflict with rulings by other appellate courts, both state and federal. These cases have properly held that *Liepelt* requires reversal for failure of the trial court to give the instruction on non-taxability of jury awards without reference to a "harmless error" rule. *Lang* v. *Texas & Pacific Railway Company,* 624 F. 2d 1275, (5th Cir. 1980) is one such case. It is a wrongful death action under the Federal Employer's Liability Act. The railroad contended that the trial judge erred in refusing to give a requested charge dealing with the effect of income taxation. The Fifth Circuit held that *Liepelt* must be applied, noting that *Liepelt* was decided on February 19, 1980, subsequent to the trial of the *Lang* case and while the *Lang* case was on appeal. The *Liepelt* decision effectively changed the law, and the Fifth Circuit held it was its duty to apply the law in effect at the time it rendered its decision, unless to do so would result in "manifest injustice". The Fifth Circuit did not find that retroactive application of *Liepelt* to its case would result in "manifest injustice". The holding of the Court was that in light of the *Liepelt* decision it must find that

the trial court erred in refusing to give the proper charge. Accordingly, the court reversed and remanded for a new trial on the issue of damages and did not hold that the "harmless error" rule had any application.

In *Cazad* v. *Chesapeake and Ohio Railway Company,* 622 F. 2d 72, (4th Cir. 1980) the Fourth Circuit reached the same result. This was a Federal Employer's Liability Act case in which a jury verdict was rendered in favor of the employee in the amount of $284,000.00. The employee had suffered serious and disabling injuries. The appellate court did not try to dissect the jury award, pro rating the award between various and sundry elements of damage. It held, p. 75:

> "The cause must be remanded, however, for error by the district court in its instruction on damages. The defendant requested the district court to instruct the jury as follows:
>
> > 'You are charged that any award made to plaintiff as damages in this case, if any award is made, is not subject to federal or state income taxes, and you should not consider such taxes in fixing the amounts of any award made to plaintiff, if any you made.'
>
> The requested instruction was refused. Since trial in the district court the Supreme Court in *Norfolk & Western Railway Co.* v. *Liepelt,* (1980) (citation omitted) has held that such an instruction was proper in a FELA case and ordered reversal of judgment in that case for failure to give the instruction. That decision is controlling in this FELA case and mandates reversal.
>
> The judgment below is accordingly reversed and the case is remanded to the district court for proceedings consistent with this opinion."

The court did not engraft a "harmless error" rule onto the *Liepelt* decision.

Seaboard Coast Line Railroad Company v. *Yow,* 384 So. 2d 13, (S. Ct., Ala. 1980), was another Federal Employer's Liability Act case interpreting *Liepelt.* The railroad alleged error by the trial court in refusing to charge the jury that any award of damages would not be subject to federal or state income taxes. The court ruled as follows, p. 13:

> "After this case was argued before this Court, the United States Supreme Court rendered its decision in *Norfolk & Western Ry. Co.,* (citation omitted) and held that it was error for a trial judge to refuse requested instructions that an award of damages in an FELA case was not subject to federal taxation. The majority of that Court bottomed their holding by saying, 'It is entirely possible that the members of the jury may assume that a plaintiff's recovery . . . will be subject to federal taxation, and that the award should be increased substantially in order to be sure that the injured party is fully compensated.' On the authority of *Norfolk and Western Ry. Co.,* the judgment is reversed for a new trial."

There was no "harmless error" rule applied.

A factually similar case is *Oltersdorf* v. *Chesapeake & Ohio Railroad Company,* 83 Ill. App. 3rd 457, 404 N.E. 2d 320 (App. Ct. Ill. 1st Dist. 1980). Again in this Federal Employer's Liability Act case, the railroad claimed error by the trial court in not allowing evidence as to the impact of taxation on the employee's lost future earnings and refusing to instruct the jury its award of damages would not be subject to taxation. The plaintiff suffered an amputation of his right leg just below the knee. The court noted that since oral argument of its case the Supreme Court of the United States had rendered its decision in *Liepelt.* The court applied *Liepelt* holding at p. 325:

> "Plaintiff's counsel has attempted to distinguish *Liepelt* from the instant case. He contends *Liepelt* deals only with wrongful death actions under the FELA in which damages

> are limited to decedent's contributions to the surviving dependents. We find no merit in this contention and conclude the *Liepelt* decision controls this case.
>
> There is no language in the opinion of the United States Supreme Court to indicate it is limited to wrongful death cases under the FELA."
>
> "Therefore we must apply the teaching of the United States Supreme Court in *Liepelt* to the case before us. We hold the trial court erred in refusing to allow evidence of the impact of taxation on plaintiff's lost future earnings and in refusing to instruct the jury its award of damages was not subject to taxation."

The court reversed the case and remanded for a new trial on the issue of damages and did not apply a "harmful error" rule.

Nesmith v. *Texaco, Inc., et al,* 491 F.S. 561 (W. D. La., 1980) is a case in which the district court applied *Liepelt* without reservation. The court, after noting the *Liepelt* decision at page 563, made its determination of damages by subtracting the income tax that would have been paid on the lost wages of the plaintiff to arrive at the amount due and owing the seaman who was injured.

Crabtree v. *St. Louis-San Francisco Railway Company,* 411 N.E. 2d 19, 25 (App. Ct. Ill., 1980) is a case brought by a railroad employee under the Federal Employer's Liability Act for damages for personal injuries sustained to this lower back. Noting that there was no suggestion that the decision in *Liepelt* be given prospective application only, the court held that reversal was required for failure of the trial court to give an instruction on the non-taxability of the damages awarded for personal injury. The Illinois court, having been presented with all the issues which are germane to this petition for writ of certiorari, held that *Liepelt* would be applied to cases that had been completed in the trial court prior to the *Liepelt* decision but were not

argued in the Court of Appeals until after the *Liepelt* decision. This court did not apply a "harmless error" rule.

All of these decisions interpreting *Liepelt* hold that *Liepelt* must be applied to those cases which were pending on appeal at the time the *Liepelt* decision was rendered. All of the cases further hold that failure to give the instruction on non-taxability of a jury award is error which requires reversal and remandment for a new trial on the issues of damages. *None of the cases applies a "harmless error" rule to circumvent the requirements of Liepelt.* Only the decision of the Eighth Circuit in this case runs contrary to the proper application of *Liepelt* and creates a conflict in the federal circuits which should be resolved.

CONCLUSION

It is respectfully submitted that this petition for writ of certiorari should be granted to resolve the conflict between the fourth and fifth circuits and the Eighth Circuit and the conflict between the Eighth Circuit and the *Liepelt* decision of this Court which emphatically holds that failure to give an instruction on the non-taxability of a jury award for personal injury is reversible error.

DATED: December 31, 1980

Respectfully submitted,

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APPENDIX

EXHIBIT "A"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1703

Edward L. Flanigan,
Appellee,

v.

Burlington Northern Inc., a corporation,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: March 12, 1980
Filed: September 4, 1980

Before LAY, Chief Judge, HENLEY and McMILLIAN,
Circuit Judges.

LAY, Chief Judge.

The Burlington Northern, Inc. (BN) appeals from a judgment entered on a jury verdict awarded for injuries to one of its employees incurred during the course of his employment. The action was brought under the Federal Employers' Liability Act (FELA), 53 Stat. 1404, 45 U.S.C. §§ 51-60 (1976).

Edward L. Flanigan was an inspector-carman for the Burlington Northern. BN had a safety rule which required an employee working on the track to place a blue flag on the end of the train or a blue light if it was dark. Its purpose was to prevent the train from being moved. When Flanigan was injured he was hooking up the air brake hoses on cars located on track 11. He had not put out a blue flag on track 11. It was dark and the engineer could not see anyone working on the train, nor could plaintiff see the cars being moved onto track 11. No warning whistle was sounded when the cars were sent onto the track. The train knocked Flanigan to the ground. He managed to kick his right leg out of the way but his left leg slipped on some loose coal and was run over by the train. It was necessary to amputate his left leg several inches above the knee.

At about the time Flanigan became a carman he viewed a slide presentation explaining the blue flag rule. He also indicated that he had some knowledge of the blue flag rule when he answered several questions concerning it on a 1969 job application to BN.

The evidence showed, however, that the blue flag rule was seldom utilized and enforced. Flanigan had been told by more experienced employees that blue flags were not used in the yard. He was never supplied any blue flags nor was he told where he would get them. Flanigan testified that he had seen a blue flag used only once and that was on the "rip track" where repairs are made on defective cars. Another carman, who had worked on the yards for five years, testified that it was not a practice to use blue flags and that he had never seen a carman use a blue flag.

The jury awarded Flanigan a verdict of $500,000. After entry of judgment on the verdict the railroad appealed.

On appeal the railroad urges diverse errors allegedly occurring at trial. The most salient concern on appeal relates to the trial court's failure to instruct on the nontaxability of the damage award. Subsequent to the entry of judgment pending

this appeal, the Supreme Court held in a wrongful death case brought under the FELA that it was prejudicial error for a trial court to fail to instruct that any award under the FELA was not subject to income tax. *Norfolk & Western Railway* v. *Leipelt,* 100 S.Ct. 755 (1980). We discuss the issues raised seriatim.

Sole Proximate Cause.

The railroad first argues that Flanigan cannot recover because his conduct as a matter of law was the sole proximate cause of his injuries. The railroad relies on two blue flag rule cases. *Perry* v. *Misouri - Kansas - Texas Railroad,* 340 Mo. 1052, 104 S.W.2d 332 (1937); *Kramer* v. *Missouri - Kansas - Texas Railroad,* 326 Mo. 792, 32 S.W.2d 1075 (1930). Contrary to defendant's argument these decisions support the submission to the jury of the issue of proximate cause. In both cases the Supreme Court of Missouri held that the issue of proximate cause was properly submitted to the jury and affirmed the verdicts. The court in *Perry* specifically stated:

> In view of the evidence set out, *supra,* as to the observance of the blue light rule, in defendant's yards when an employee was doing the character of work plaintiff was attempting to do when injured, *we cannot say, as a matter of law, that plaintiff's failure to put up the blue light was the sole proximate cause of his injury.*

Perry v. *Misouri - Kansas - Texas Railroad,* 340 Mo. 1052, 104 S.W.2d 332, 339 (1937) (emphasis added).

Flanigan, as did the plaintiffs in *Kramer* and *Perry,* offered evidence that the blue flag rule was not followed. Where the evidence shows that it was the custom of the railroad not to enforce a safety rule, the jury was entitled to consider the issue of proximate cause. As succinctly observed by the Fifth Circuit:

> The question as to the violation of the appellant's safety rule by the appellee was properly in this case. But whether

> it was a cause of the injury, and if so whether the sole or a contributing cause, and if the latter, the extent of the contribution were properly treated as questions for the jury.

Illinois Central Railroad v. *Andre,* 267 F.2d 372, 374 (5th Cir. 1959).

We hold that violation of the blue flag rule did not per se result in the employee being the sole proximate cause of his injuries. *See Boop* v. *Baltimore & Ohio Railroad,* 118 Ohio App. 171, 193 N.E.2d 714 (1963).[1]

---

[1] Defendant also argues the district court erred in failing to give a sole proximate cause instruction. However, the cases cited by defendant merely hold that it is not error to give such an instruction. *Zappia* v. *Baltimore & O.R.R.,* 312 F.2d 62, 64 (6th Cir. 1963); *Jones* v. *Illinois Terminal R.R.,* 260 S.W.2d 487, 491 (Mo. 1953). The court is not required to give such an instruction. *Louisville & N. R.R.* v. *Vickery,* 288 Ala. 555, 263 So.2d 656 (1972); *Seaboard Coast Line R.R.* v. *Whitehead,* 288 Ala. 505, 262 So.2d 752 (1972). In *Almendarez* v. *Atchison, T. & S. F. Ry.,* 426 F.2d 1095 (5th Cir. 1970) the court held:

> We agree with the plaintiff that the railroad's theory to support its requested instruction is an attempt to engraft the common-law doctrine of sole proximate cause onto the Federal Employers' Liability Act. The standards of liability for negligence under the Act must not be confused with those under the common law. This proposition, in the light of a requested instruction on sole proximate cause which was granted, was well stated by Judge Brown in Page v. St. Louis Southwestern Ry., 349 F.2d 820 (5th Cir. 1965):
>
> "[O]rdinarily in FELA cases there is really no place for this issue in the jury submission as such. * * * This effort to cross examine the jury— * * * —leads only to confusion and a proliferation of metaphysical terms scarcely understandable to the most astute scholar. * * *
>
> "Of course the substantive law recognizes that if the negligence of the Employee is the sole cause of the injury or death, there is no liability. (citing cases). This is sometimes spoken of as the employee's contributory negligence being the

Inadmissible Evidence.

The railroad objected to the line of testimony concerning the present and possible expanded use of two-way radios in the yard. It urges the admission of such testimony is reversible error for several reasons: (1) an employer is not required to supply employees with the latest equipment provided those in use are reasonably safe and suitable; (2) the railroad is not required to provide alternative safety measures when blue flags are available; (3) the railroad is not negligent if the alternative safety device would not have assisted in preventing the injury; and (4) evidence inferring that Flanigan would have heard any instructions over a radio that would have notified him of the danger is speculative.

The railroad also sought to introduce a slide presentation explaining the blue flag rule, which plaintiff viewed prior to his injury. The district court sustained an objection to it on the grounds that it was inflammatory, and inaudible.

The admissibility of evidence in FELA cases is ordinarily left to the discretion of the trial court and the court will not be reversed unless it abused its discretion. *See, e.g., Lavender* v. *Kurn,* 327 U.S. 645, 654 (1946); *Chicago & North Western Railway* v. *Green,* 164 F.2d 55, 62 (8th Cir. 1947); *Cardwell* v.

> sole proximate cause, but this is both an inaccurate use of the term 'contributory' and seems to be wholly unnecessary since a jury, honestly determining that the injured employee's actions were the sole cause of injury, necessarily finds (either on a general charge or by special interrogatories) that no act of the railroad, even though found to be negligent, played any part in bringing about the injury. * * * We ought to avoid those practices which 'distract the jury's attention from the simple issues of whether the carrier was negligent and whether that negligence was the cause, in whole or in part, of the plaintiff's injury.' " 349 F.2d 826-827.

Id. at 1097 (footnote omitted).

Chesapeake & Ohio Railway, 504 F.2d 444, 448 (6th Cir. 1974); *Cf. Simpson* v. *Norwesco, Inc.,* 583 F.2d 1007, 1013 (8th Cir. 1978) (non-FELA case). The testimony concerning two-way radios was limited in scope. The plaintiff did not testify that he should have had a radio—other carmen did say it might be helpful. The district court did not abuse its discretion in allowing this testimony into evidence. Similarly, once the blue flag rule was in evidence and the evidence showed that the plaintiff had viewed the slides, it was not abuse of discretion to rule out the evidence.

Special Interrogatories.

The railroad argues the lower court committed error in failing to submit special interrogatories pursuant to Fed. R. Civ. P. 49(b) as requested. It has been observed: "The decision whether to use a general verdict accompanied by special interrogatories, as authorized by Rule 49(b), is similarly committed to the unreviewable discretion of the trial judge." 9 Wright & Miller, Federal Practice and Procedure: Civil § 2511, at 522 (1971). *See, e.g., Thomson* v. *Anderson,* 138 F.2d 277 (8th Cir. 1943); *Turchio* v. *D/S A/S Den Norske Africa,* 509 F.2d 101, 104 (2d Cir. 1974); *Elston* v. *Morgan,* 440 F.2d 47, 49 (7th Cir. 1971); *Zaiko* v. *District of Columbia,* 427 F.2d 606, 609 (D.C.Cir. 1970). We find no error here.

Excessive Verdict.

The railroad argues that the jury verdict of $500,000 was excessive. If the verdict is to be overturned because of its size, it must be so large as to shock the judicial conscience. *See, e.g., Scoville* v. *Missouri Pacific Railroad,* 458 F.2d 639, 647 (8th Cir. 1972); *Chicago, Rock Island & Pacific Railroad* v. *Melcher,* 333 F.2d 996, 1001 (8th Cir. 1964). This court has stated:

> [E]xcessiveness of a verdict is basically, and should be, a matter for the trial court which has had the benefit of hear-

> ing the testimony and of observing the demeanor of the witnesses and which knows the community and its standards; that this is a responsibility which, for better working of the judicial process and for other seemingly obvious reasons, is best placed upon its shoulders; and that we shall continue to consider review, as we have said before, not routinely and in every case, but only in those rare situations where we are pressed to conclude that there is "plain injustice" or a "monstrous" or "shocking" result.

Solomon Dehydrating Co. v. *Guyton,* 294 F.2d 439, 447-48 (8th Cir.), *cert. denied,* 368 U.S. 929 (1961).

The evidence showed that since the amputation of his left leg, Flanigan has had severe and constant phantom pains, rash, infection, and misalignment of the hip. He also suffers from lower back pains, frequent falls, and excessive sweating. he can no longer garden, swim, hunt, dance or do maintenance work on his house. In view of the severity of plaintiff's injuries and the fact that he continues to have medical problems the verdict is not excessive.

Instructions

I. Plaintiff's Instructions.

The railroad argues that it was error to give plaintiff's instruction on loss of earning capacity since there was no evidence to sustain it. The evidence demonstrates that plaintiff suffered permanent injuries that prevent him from working. *Illinois Central Railroad* v. *Staples,* 272 F.2d 829, 833 (8th Cir. 1959); *Quilter* v. *Elgin, Joliet & Eastern Railway,* 409 F.2d 338, 340 (7th Cir. 1969). The instruction was clearly proper.

The railroad also argues that it was error to give plaintiff's instruction on pain and suffering because it did not instruct the jury to reduce the award to present value. In *Chicago & North Western Railway* v. *Chandler,* 283 F. 881 (8th Cir. 1922), this

court held it was not error for the trial court to refuse to instruct the jury to reduce any award for pain and suffering to present value. *Id.* at 884-85. Although there is sparse authority on this point, the other circuits have generally followed the lead of *Chandler. See Taylor* v. *Denver & Rio Grande Western Railroad,* 438 F.2d 351, 352-53 (10th Cir. 1971); *Texas & Pacific Railway* v. *Buckles,* 232 F.2d 257, 264 (5th Cir. 1956); 3 Devitt & Blackmar, Federal Jury Practice & Instructions § 85.13, at 125 (Notes) (3d ed. 1977); Annot., 60 A.L.R. 2d 1347, 1352-53 (1958). Recently, the Second Circuit held that future pain and suffering should be reduced to present value, *Chiarello* v. *Domenico Bus Service, Inc.,* 542 F.2d 883, 886 (2d Cir. 1976), however, we believe that the better reasoned position is that taken in *Chandler.* The *Chandler* court said:

> The application of the present value rule by the jury in making up the amount of damages to be allowed for the deprivation of pecuniary benefits arising from probable future earnings is not only just, but feasible. It is feasible because the jury may from actual past earnings, with other factors in the problem proven, set opposite each year of the estimated life the sum which would probably be earned that year, and in death cases the probable pecuniary benefit to the party complaining or beneficially interested. These several sums can then be reduced to their present value. No such process is possible in estimating the amount to be allowed for pain and suffering, or for pain and inconvenience. In the matter of pain, suffering, or inconvenience, no books are kept, no inventories made, no balances struck.
>
> Neither the plaintiff in the case nor any one else in the world has ever established a standard of value for these ills. The only proof ever received to guide the jury in determining the amount of the allowance they should make is, broadly stated, the nature and extent of the injury, its ef-

> fect and results. They are instructed to allow a reasonable sum as compensation, and in determining what is reasonable under the evidence to be guided by their observation, experience and sense of fairness and right. At the best the allowance is an estimated sum determined by the intelligence and conscience of the jury, and we are convinced that a jury would be much more likely to return a just verdict, considering the estimated life as one single period, that if it should attempt to reach a verdict by dividing the life into yearly periods, setting down yearly estimates, and then reducing the estimates to their present value. The arbitrariness and artificiality of such a method is so apparent that to require a jury to apply it would, we think, be an absurdity.

The same amount of pain and suffering does not occur from year to year nor can the degree of pain and suffering that will occur in any year be quantified with any degree of certainty. Requiring the reduction of an award for pain and suffering to its present value would improperly allow a jury to infer that pain and suffering can be reduced to a precise arithmetic calculation. Therefore, we hold that the trial court properly denied the requested instruction.

2. **Defendant's Requested Instructions.**

(a) **Contributory Negligence**

The railroad objected to the district court's failure to give requested instructions concerning contributory negligence. The district court instructed the jury that, "Contributory negligence is fault on the part of a person injured, which cooperates in some degree with the negligence of another, and so helps to bring about the injury." The court's instruction was taken from 3 Devitt & Blackmar, Federal Jury Practice & Instructions §

94.16 (3d ed. 1977). Failure to give defendant's requested instruction further defining contributory negligence was not error since the district court's instruction adequately defined the term. *See King* v. *State Farm Life Insurance Co.,* 448 F.2d 597, 600 (8th Cir. 1971); *Honebein* v. *McDonald,* 299 F.2d 493, 495-96 (8th Cir. 1962).

The railroad also requested an instruction stating that it was the duty of plaintiff to be free from contributory negligence. Such an instruction is misleading. Contributory negligence is not a bar to recovery in an FELA case as defendant's instruction would have led the jury to believe. *Rogers* v. *Missouri Pacific Railway,* 352 U.S. 500, 506 & n.12 (1957); *Tiller* v. *Atlanta Coast Line Railroad,* 318 U.S. 54, 66-67 (1943); *Chicago Great Western Railway* v. *Scovel,* 232 F.2d 952, 957 (8th Cir. 1956). Therefore, the district court properly denied the instruction.

(b) **Nontaxability of Jury Award.**

The railroad objected to the district court's failure to give the following instruction: "You are instructed that any award made to plaintiff as damages in this case, if any award is made, is not subject to state or federal income taxes, and you should not consider such taxes in fixing the amount of any award made plaintiff, if any you make."

In *Norfolk & Western Railway* v. *Liepelt,* 100 S.Ct. 755 (1980), the Supreme Court, in reviewing a wrongful death award under the FELA, found a gross disparity between the verdict and the pecuniary loss proven. It observed that the award was improperly inflated and that it was not "fanciful to suppose" that the jury believed that a large portion of the award would be payable in income taxes. It held that it was necessary that the jury be instructed that no damage award shall be subject to income tax.

The *Liepelt* holding thus overruled the great majority of federal and state cases which have generally found the instruction to be too speculative and conjectural or too difficult for a jury to follow.[2]

In 1973, Judge Bright in *Rouse* v. *Chicago, Rock Island & Pacific Railroad,* 474 F.2d 1180 (8th Cir. 1973), reiterated this court's earlier view set out in *Raycraft* v. *Duluth, Missabe & Iron Range Railway,* 472 F.2d 27, 33 (8th Cir. 1973), stating:

> In view of the state of the law and the record in the instant case, this Court will not pass on the issue at the pre-

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[2] Too difficult or complex to follow. *See Johnson* v. *Penrod Drilling Co.,* 510 F.2d 234 (5th Cir. 1975); *Scruggs* v. *Chesapeake & O. Ry.,* 320 F. Supp. 1248 (W.D. Va. 1970); *Plourd* v. *Southern Pac. Transp Co.,* 266 Ore. 666, 513 P.2d 1140 (1973); *Hall* v. *Chicago & N.W. Ry.,* 5 Ill.2d 135, 125 N.E.2d 77 (1955). Too speculative or conjectural. *See Scalise* v. *Central R.R. of N. J.,* 129 N.J. Super. 303, 323 A.2d 525 (1974); *Henninger* v. *Southern Pac. Co.,* 59 Cal. Rptr. 76 (Ct. App. 1967). *Cf. Texas & N.O. R.R.* v. *Pool,* 263 S.W.2d 582 (Tex. Civ. App. 1953). Collateral matter. *See Raines* v. *New York Cent. R.R.,* 51 Ill.2d 428, 283 N.E.2d 230 (1972); *Bergfeld* v. *New York, C. & St. L. R.R.,* 103 Ohio App. 87, 144 N.E.2d 483 (1956); *Hall* v. *Chicago & N.W. Ry.,* 5 Ill.2d 135, 125 N.E.2d 77 (1955). Raises more problems than it would solve. *See Combs* v. *Chicago, St. P., M & O Ry.,* 135 F. Supp. 750 (N.D.Ia. 1955); *Briggs* v. *Chicago Great W. Ry.,* 248 Minn. 418, 80 N.W.2d 625 (1957). Long standing practice need not be overruled. *See Rouse* v. *Chicago R.I. & P.R.R.,* 474 F.2d 1180 (8th Cir. 1973); *Blake* v. *Delaware & H. Ry.,* 484 F.2d 204 (2d Cir. 1973); *Greco* v. *Seaboard Coast Line R.R.,* 464 F.2d 496 (5th Cir. 1972); *Payne* v. *Baltimore & O.R.R.,* 309 F.2d 546 (6th Cir. 1962); *Altemus* v. *Pennsylvania R.R.,* 32 F.R.D. 7 (D.Del. 1963); *St. Louis S.W. Ry.* v. *Greene,* 552 S.W.2d 880 (Tex. Civ. App. 1977); *Norfolk S. Ry.* v. *Rayburn,* 213 Va. 812, 195 S.E.2d 860 (1973); *Missouri-K-T R.R.* v. *Miller,* 486 P.2d 630 (Okla. 1971); *St. Johns River Terminal Co.* v. *Vaden,* 190 So. 2d 40 (Fla. Ct. Ap. 1966); *Bracy* v. *Great N. Ry.,* 136 Mont. 65, 343 P.2d 848 (1959); *Louisville & N. R.R.* v. *Mattingly,* 318 S.W.2d 844 (Ky. 1958); *Maus* v. *New York, C. & St. L. Ry.,* 165 Ohio St. 281, 135 N.E.2d 253 (1956); *Wagner* v. *Illinois Cent. R.R.,* 7 Ill. App. 2d 445, 129 N.E.2d 771 (1955).

> sent time. Even if this panel were to adopt the instruction, this panel would do so only prospectively.

Id. at 1183.

And more recently, citing *Raycraft* and *Rouse,* speaking through Judge McMillian, this court indicated that although it favored an instruction on the nontaxability of damages, nonetheles "the position in this circuit is that such instructions are not required, and we have said any change in this position would be prospective only." *Taenzler* v. *Burlington Northern, Inc.,* 608 F.2d 796, 802 (8th Cir. 1979).

The fundamental question presented here is whether the Supreme Court's mandate in *Liepelt* requires us to apply this change of law in the present case when it was pending review at the time *Liepelt* was decided. We think it does.

The oft quoted rule of Mr. Chief Justice Marshall set out in *United States* v. *Schooner Peggy,* 5 U.S. (1 Cranch) 103 (1801), governs here:

> It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional . . . I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties but in great national concerns . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

Id. at 110.

The rule has recently been approved and analyzed by the Supreme Court. *See Bradley* v. *School Board,* 416 U.S. 696, 710-21 (1974). Defendant BN argues the application of the rule here.

Flanigan, on the other hand, urges that we apply the test in *Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971), that weighs relevant factors in deciding whether a new rule is retroactive.[3] In a recent decision, the Missouri Court of Appeals applied the *Chevron* test to the identical question involved here. In *Ingle* v. *Illinois Central Gulf Railroad,* No. 40300 (Mo. Ct. App., filed July 1, 1980), the court of appeals applied *Liepelt* prospectively only. In doing so the court reasoned: (1) the trial judge in not giving the instruction was executing his duties according to existing law; (2) prior history of the rule shows the primary purpose underlying *Liepelt* was the court's decision to prevent excessive verdicts, which the *Ingle* verdict was not, thus, in *Ingle* retroactive application would not further the purpose of the rule nor would prospective application "retard" its operation; (3) the courts in the three cases relied upon by the Supreme Court in *Liepelt* prospectively applied the new rule with respect to the in-

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[3] In *Chevron* the Court observed:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding nonretroactivity." . . .

404 U.S. at 106-07 (citations omitted).

come tax instruction;[4] (4) applying *Liepelt* retroactively would produce substantial inequitable results to the plaintiff.

Notwithstanding the appeal of such rationale, we have serious doubts the doctrine of nonretroactivity is applicable here. In *Bradley* the Court reasoned:

> This Court in the past has recognized a distinction between the application of a change in the law that takes place while a case is on direct review, on the one hand, and its effect on a final judgment under collateral attack, on the other hand. *Linkletter* v. *Walker,* 381 U.S. 618, 627 (1965). We are concerned here only with direct review.

416 U.S. 710-11 (footnotes omitted).

Although it would appear *Bradley* makes a viable distinction between cases on direct review and collateral attack, other recent authority makes this assumption seem questionable.[5]

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[4] *Burlington Northern, Inc.* v. *Boxberger,* 529 F.2d 284, 297 (9th Cir. 1975); *Domeracki* v. *Humble Oil & Ref. Co.,* 443 F.2d 1245, 1251 (3d Cir. 1971); *Dempsey* v. *Thompson,* 363 Mo. 339, 251 S.W.2d 42 (1952).

[5] *See Williams* v. *United States,* 401 U.S. 646 (1971), where, in discussing *Linkletter* v. *Walker,* the Court observed:

> In *Linkletter* v. *Walker,* 381 U.S. 618 (1965), we declined to give complete retroactive effect to the exclusionary rule of *Mapp* v. *Ohio,* 367 U.S. 643 (1961). Relying on prior cases, we firmly rejected the idea that all new interpretations of the Constitution must be considered always to have been the law and that prior constructions to the contrary must always be ignored. Since that time, we have held to the course that there is not inflexible constitutional rule requiring in all circumstances either absolute retroactivity or complete prospectivity for decisions construing the broad language of the Bill of Rights. *Nor have we accepted as a dividing line the suggested distinction between cases on direct review and those arising on collateral attack.* Rather we have proceeded to "weigh the mertis and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.

The *Bradley* v. *Schooner Peggy* rule gives presumptive weight to applying the change of law retroactively *unless* manifest injustice would follow. On the other hand, the *Chevron* tests provide a more neutral, objective basis for analyzing whether a change in law should be applied only prospectively. When constitutional or procedural rules are involved the *Linkletter - Williams - Chevron* rule is clearly applicable. However, where there is a decisional change of state or federal substantive law between the time of trial and appeal, it would appear the *Schooner Peggy* doctrine is controlling. *See Robinson* v. *Neil,* 409 U.S. 505 (1973); *Vandenbark* v. *Owens - Illinois Glass Co.,* 311 U.S. 538 (1941). We conclude we are controlled by the language in *Bradley* relying on *Thorpe* v. *Housing Authority of Durham,* 393 U.S. 268 (1969), that "a court is to apply a law in effect at the time it renders its decision" unless there exists a "manifest injustice." Mr. Justice Blackmun expands this discussion by observing:

> Although the precise category of cases to which this exception applies has not been clearly delineated, the Court in *Schooner Peggy* suggested that such injustice could result "in mere private cases between individuals," and implored the courts to "struggle hard against a construction which will, by a retrospective operation, affect the rights of parties."

416 U.S. at 717.

The Court sets out three tests to be applied in determining the possible working of manifest injustice: (a) the nature and identi-

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401 U.S. at 651-52 (emphasis added) (footnotes omitted).

See also our opinion in *Martin* v. *Wyrick,* 568 F.2d 583 (8th Cir. 1978), where on the strength of *Linkletter* and *Williams* we held the newly announced rule of *Faretta* v. *California,* 422 U.IS. 806 (1975), providing the right of self-representation, not applicable to cases pending appeal at the time *Faretta* was announced.

ty of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights. *Id.*

Although the present case may be viewed as a "routine private lawsuit" between disparate parties, i.e. an individual and a large corporate entity, we perceive by plaintiff's success in obtaining a verdict below, the disparity of the parties has not affected "the respective abilities of the parties adequately to present and protect their interests." *Id.* at 718. Secondly, the nature of their rights is such that at least under the prior views of this court, that it cannot be said that the intervening change "would infringe upon or deprive a person of a right that had matured or become unconditional." *Id.* at 720. Nor do we feel the nature of the impact of the change in law upon existing rights is significant. As the Supreme Court reasoned in *Liepelt,* the plaintiff has never been able to prove loss of earnings solely on a gross earning basis. *Liepelt,* 100 S.Ct. at 757.

Assuming prejudical error, plaintiff must, at the very worst, give up his verdict and have a new trial on damages only. We perceive inconvenience to the plaintiff but little injustice. Therefore, we conclude under *Schooner Peggy* and its progeny we must apply the substantive change in law as announced by *Liepelt.* In this instance we find that the rule in *Liepelt* requires us to say it was erroneous for the trial court to fail to instruct on the nontaxability of the award.

This does not, however, end our inquiry. The Supreme Court found in *Liepelt* the failure to give the cautionary instruction on nontaxation of the award was error. However, the Court also found error in failing to allow the defendant railroad to prove through its economist the projected net earnings after taxes. On this combination of error, the Court found the error to be prejudicial requiring a new trial.

Jury instructions are subject to the "harmless error" rule, *General Insurance Co. of America* v. *Hercules Construction Co.,* 385 F.2d 13, 24 (8th Cir. 1967), which requires reversal of a

trial court judgment only if errors adversely affect the substantial rights of the complaining party. *Gilliam* v. *City of Omaha,* 524 F.2d 1013, 1015 (8th Cir. 1975); *Skogen* v. *Dow Chemical Co.,* 375 F.2d 692, 701 (8th Cir. 1967). Under this rule, it is also generally held that it is the appellant's burden to establish the prejudicial effect of the trial court's refusal to give a requested instruction. *General Insurance Co.,* 385 F.2d at 24.

In *McWeeney* v. *New York, New Haven & Hartford Railroad,* 282 F.2d 34 (2d Cir. 1960), the Second Circuit, in considering the prejudicial effect of a trial court's failure to give a nontaxability instruction, stated: "Before an appellate court should hold that failure to give such a cautionary instruction was reversible error, there ought to be evidence either that juries in general increase recoveries on this account or that the particular jury did so." *Id.* at 39. The appellant in *McWeeney* failed to show any indication that the jury had increased the recovery so the court refused to vacate the award.[6]

This court in *Raycraft* v. *Duluth, Missabe & Iron Range Railway,* 472 F.2d 27 (8th Cir. 1973), indicated that the prejudicial effect of a failure to give a nontaxability instruction should be decided on the existence of evidence that the jury did, in fact, operate under a false impression of the tax laws.[7] *Id.* at 33 n.10.

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[6]The Second Circuit relied on a Michigan Law School study, Kalven, A Report on the Jury Project, Conference on the Aims and Methods of Legal Research, University of Michigan Law School, 167-68 (1957), to conclude that juries, in general, do not increase recoveries in the mistaken belief that they are subject to income tax. *McWeeney,* 282 F.2d at 39 & n.15. *See Rouse* v. *Chicago, R.I. & P. R.R.,* 474 F.2d 1180, 1183-84 n.3 (8th Cir. 1973).

[7]The Third Circuit has reached a similar conclusion. *Domeracki* v. *Humble Oil & Ref. Co.,* 443 F.2d 1245, 1252 & n.15 (3d Cir. 1971).

The Supreme Court in *Liepelt* was also greatly concerned with whether the jury increased the award on the misconceived notion that any award would be taxable. The *Liepelt* jury awarded the plaintiff $775,000 whereas the plaintiff's own economist testified to lost earnings of only $302,000. This large disparity between the evidence and the verdict greatly influenced the Supreme Court in deciding that the failure of the trial court to give a nontaxability instruction was prejudicial error.

Liepelt involved a wrongful death award and the plaintiff's proof concentrated on his loss of pecuniary earnings and contribution to his dependents. In the present case, in addition to being compensated for loss of future income that resulted from losing his leg, Flanigan was also entitled to compensation for his medical expenses and pain and suffering. The pain and suffering in this case was substantial. Plaintiff's amputation "started just under the knee or right below the knee and went right down the leg and severed the bone just above the ankle." Six wheels of the train passed over his leg. Plaintiff testified that when the train had come to a stop:

> My foot was still attached and I felt down and I could feel the blood was—my main vein was cut and there was blood squirting out of it, so I took my shirt off and made a tourniquet out of it and I tied it—there were sticks in the yard and I tied it down and put the sticks in it and pulled it.

After he made a tourniquet, Flanigan was in severe pain and had to crawl through the yard yelling for help. It was 45 minutes before he was discovered. Plaintiff testified that he continues to have considerable pain. Considering plaintiff's pain and suffering, his medical expenses as well as his loss of earning potential, the verdict does not indicate that the jury erroneously speculated that plaintiff's award would be subject to income tax.

In the present case the railroad was not precluded from offering relevant evidence of net earnings. Additionally, the defendant has failed to point out any evidence that the jury inflated its award on the erroneous belief that the award would be taxable. In fact, the evidence fully supports the jury's verdict and indicates that the jury was *not* operating under any misconceived notions of the tax laws. In the present case without evidence of an excessive verdict and considering all of the other relevant factors, we find the failure to give the instruction was not prejudicial to the rights of the parties. Under the present circumstances we hold the error was harmless.

Judgment affirmed.

A true copy.

Attest.

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

EXHIBIT "B"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1703

September Term, 1980

Edward L. Flanigan,
Appellee,

vs.

Burlington Northern Inc., etc.,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

The Court, having considered appellant's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

Judge Bright was disqualified and did not vote, and Judge Ross would grant the petition for rehearing en banc.

October 16, 1980

EXHIBIT "C"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

78-601C (3)

Edward L. Flanigan,
Plaintiff,

vs.

Burlington Northern, Inc., a Corporation,
Defendant.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable John F. Nangle, District Judge presiding, and the issues having been duly tried and the jury having returned its verdict in favor of the plaintiff and against the defendant:

It is ORDERED and ADJUDGED that the plaintiff recover of the defendant, the sum of $500,000.00 dollars damages under plaintiff's cause of action with interest thereon at the rate of 6% per annum and costs.

WILLIAM D. RUND, Clerk
U.S. District Court

By: EARL M. RANEY
Deputy Clerk

Dated at St. Louis, Missouri
this 28th day of June, 1979.

EXHIBIT "D"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 78 - 601 C (3)

Edward L. Flanigan,
Plaintiff,

vs.

Burlington Northern, Inc.,
Defendant.

ORDER

This matter is before the Court upon post-trial motions filed by defendant. Defendant has filed a motion for credit against judgment, setting forth various amounts which defendant claims to already have paid on plaintiff's behalf. In response, plaintiff asserts that he

> has no knowledge or information with which to verify the exact amounts of the claimed benefits and payments allegedly made, and therefore respectfully suggests to the Court that exact amounts claimed be appropriately verified.

The Court further notes that defendant has failed to comply with Rule 7 (B), Rules of the United States District Court for the Eastern Judicial District of Missouri, in connection with its motion for credit against judgment.

Accordingly,

IT IS HEREBY ORDERED that defendant shall, within seven days of this date, appropriately verify the amount of credits claimed in its motion for credit against judgment and file a list of citations of authorities on which defendant relies in support of said motion, at which time this matter will be resubmitted to the Court for consideration.

IT IS FURTHER ORDERED that defendant's motion for judgment in accordance with its motion for directed verdict, for judgment notwithstanding the verdict or in arrest of judgment be and is denied.

/s/ John F. Nangle
United States District Judge

Dated: July 18, 1979.

EXHIBIT "E"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1703

September Term, 1979

Edward L. Flanigan,
Appellee,

vs.

Burlington Northern Inc., a Corporation,
Appellant.

JUDGMENT

APPEAL FROM the United States District Court for the Eastern District of Missouri.

THIS CAUSE came on to be heard on the original designated record of the United States District Court for the Eastern District of Missouri and briefs of the respective parties and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed in accordance with the Court's opinion.

September 4, 1980

Order entered in accordance with opinion:

Robert D. St Vrain

Clerk, U.S. Court of Appeals, 8th Circuit.

EXHIBIT "F"

Defendant's Instruction #2.

You are instructed that any award made to plaintiff as damages in this case, if any award is made, is not subject to state or federal income taxes, and you should not consider such taxes in fixing the amount of any award made plaintiff, if any you make.

EXHIBIT "G"

5. WHETHER THE DISTRICT COURT ERRED WITH REGARD TO JURY INSTRUCTIONS AS FOLLOWS:

E. IN REFUSING THE RAILROAD'S TENDERED INSTRUCTION TWO INSTRUCTING THE JURY THAT ANY AWARD MADE TO FLANIGAN IS NOT SUBJECT TO INCOME TAXES.

The Railroad's tendered instruction #2 states as follows:

"You are instructed that any award made to plaintiff as damages in this case, if any award is made, is not subject to state or federal income taxes, and you should not consider such taxes in fixing the amount of any award made plaintiff, if any you make." (D.R.p.35)

This instruction was offered by the Railroad and refused by the court. (T.622) There is a split on the issue of whether or not this instruction must be given if tendered. Two circuits have held that the court must instruct that the jury award will not be subject to personal income taxes when the instruction is offered. The Third Circuit case is *Domeracki* v. *Humble Oil and Refining,* 443 F. 2d 1245 and the Ninth Circuit case is *Burlington Northern Inc.* v. *Boxberger,* 529 F. 2d 284, 297 (9th Cir., 1975). In harmony with this position is *McWeeney* v. *New York, New Haven and Hartford Railroad Co.,* 282 F. 2d 34 (2nd Cir., 1960). Also in support of this position is *Anderson* v. *United Airlines,* 183 F.S. 97 (D.C.Cal,1960). The two states most involved with this litigation, that being Illinois, the site of the injury, and Missouri, the site of the trial, are in accord with this position. *Dempsey* v. *Thompson,* 251 S.W. 2d, 42, 45 (Supreme Court Missouri, 1952) states that the court is convinced that an instruction that an award of damages for personal injuries is not subject to Federal or State Income taxes should have been given in this Federal Employers' Liability Act case. The court made its ruling prospective only. *Hall* v. *Chicago & N.W.Ry. Co.,* 110

N.E. 2d 654, 661 (1st Dist.,1953) also holds that it is proper for the court to instruct the jury concerning the fact that the award would not be subject to income tax. This issue is currently pending before the United States Supreme Court in *Norfolk and Western* v. *Liepelt.* Certiorari was granted on April 16, 1979 to this case designated as No. 78-1323, 39 C.C.H. S. Ct. Bull. p.1774.

The court erred in refusing to give the tendered instruction that any award of damages is not subject to state of federal income taxes. Such error is prejudicial to the Railroad. ***Blue*** v. *Western Railway of Alabama,* 469 F. 2d 487, 497 (5th Cir., 1972) requires that if a reversal be granted on a damages issue such as this, the entire case be remanded for trial on all issues. The court stated as follows:

> "Because Western so strenuously and vigorously pressed its mitigation defense of Blue's contributory negligence during the district court proceedings and because that defense was not insubstantial, we have no alternative but to remand this matter for a new trial on all issues.... Partial reversals and remands in FELA cases are not favored unless it conclusively appears that such a disposition will not prejudice the party which has not prevailed on appeal. We have no way of knowing to what extent the jury reduced its award for Blue on the basis of a finding of Blue's contributory negligence. Such a situation would and should have been avoided through the use of special interrogatories under Rule 49, Federal Rules of Civil Procedure."

The failure to give to the jury offered instruction #2 of the Railroad is prejudicial error which should be corrected by reversal and remand for a new trial on all issues.

EXHIBIT "H"

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

KANDYTHE J. LIEPELT, Administratix, etc.

— US —, 62 L Ed 2d 689, 100 S Ct — 755 (1980)

[No. 78-1323]

Argued November 5, 1979. Decided February 19, 1980.

Opinion Of The Court

Mr. Justice Stevens delivered the opinion of the Court.

[1a, 2a] In cases arising under the Federal Employers' Liability Act,[1] most trial judges refuse to allow the jury to receive evidence or instruction concerning the impact of federal income taxes on the amount of damages to be awarded. Because the prevailing practice developed at a time when federal taxes were relatively insignificant, and because some courts are now following a different practice, we decided to answer the two questions presented by the certiorari petition in this wrongful death action: (1) whether it was error to exclude evidence of the income taxes payable on the decedent's past and estimated future earnings; and (2) whether it was error for the trial judge to refuse to instruct the jury that the award of damages would not be subject to income taxation.

In 1973 a fireman employed by petitioner suffered fatal injuries in a collision caused by petitioner's negligence.[2] Respon-

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[1] 35 State 65, 45 USC §§ 51 et seq. [45 USCS §§ 51 et seq.].

[2] The issue of liability was vigorously contested at the trial and was the subject of extensive consideration by the Appellate Court of Illinois, First District. See 62 Ill App 3d 653, 378 NE2d (1978). No aspect of that issue, however, is now before us.

dent, as administratrix of the fireman's estate, brought suit under the FELA to recover the damages that his survivors suffered as a result of his death. In 1976, after a full trial in the Circuit Court of Cook County, the jury awarded respondent $775,000. On appeal, the Appellate Court of Illinois held that it was "not error to refuse to instruct a jury as to the nontaxability of an award" and also that it "was not error to exclude evidence of the effect of income taxes on future earnings of the decedent." 62 Ill App 3d, at 668-669, 378 NE2d, at 1245. The Illinois Supreme Court denied leave to appeal.[3]

The evidence supporting the damage award included biographical data about the decedent and his family and the expert testimony of an economist. The decedent, a 37-year-old man, was living with his second wife and two young children and was contributing to the support of two older children by his first marriage. His gross earnings in the 11 months prior to his death on November 22, 1973 amounted to $11,988. Assuming continued employment, those earnings would have amounted to $16,828.26 in 1977.

The expert estimated that the decedent's earnings would have increased at a rate of approximately five percent per year, which would have amounted to $51,600 in the year 2000, the year of his expected retirement. The gross amount of those earnings, plus the value of the services he would have performed for his family, less the amounts the decedent would have spent upon himself, produced a total which, when discounted to present value at the time of trial, amounted to $302,000.

Petitioner objected to the use of gross earnings, without any deduction for income taxes, in respondent's expert's testimony and offered to prove through the testimony of its own expert, an actuary, that decedent's federal income taxes during the years 1973 through 2000 would have amounted to about

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[3] App to Pet for Cert A27-A28.

$57,000. Taking that figure into account, and making different assumptions about the rate of future increases in salary and the calculation of the present value of future earnings, petitioner's expert computed the net pecuniary loss at $138,327. As already noted, the jury returned a verdict of $775,000.

Petitioner argues that the jury must have assumed that its award was subject to federal income taxation; otherwise, it is argued, the verdict would not have exceeded respondent's expert's opinion by such a large amount.[4] For that reason, petitioner contends that it was prejudiced by the trial judge's refusal to instruct the jury that "your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award."

[3] Whether it was error to refuse that instruction, as well as the question whether evidence concerning the federal taxes on the decedent's earnings was properly excluded, is a matter governed by federal law. It has long been settled that questions concerning the measure of damages in an FELA action are federal in character. See, e.g., Michigan Cent. R. Co. v. Vreeland, 227 US 59, 57 L Ed 417, 33 S Ct 192. This is true even if the action is brought in state court. See, e.g., Chesapeake & Ohio Railway Co. v. Kelly, 241 US 485, 491, 60 L Ed 1117, 36 S Ct 630.[5] In this case the Appellate Court of Illinois recognized

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[4] Respondent argues that the excess is adequately explained by the jury's estimate of the pecuniary value of the guidance, instruction and training that the decedent would have provided to his children.

[5] One of the purposes of the Federal Employer's Liability Act was to "create uniformity throughout the Union" with respect to railroads' financial responsibility for injuries to their employees. HR Rep No. 1386, 60th Cong, 1st Sess, p 3 (1908). See also Dice v. Akron, Canton and Youngstown R. Co., 342 US 359, 362, 96 L Ed 398, 72 S Ct 312, 47 Ohio Ops 53, 63 Ohio L Abs 161; Brady v. Southern Railway, 320 US 476, 479, 88 L Ed 239, 64 S Ct 232; Hill, Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?, 17 Ohio St LJ 384 (1956).

that the practice then being followed in Illinois was subject to change when this Court addresses the issue.[6] We do so now, first considering the evidence question and then the proposed instruction.

I

[1b, 4] In a wrongful death action under the FELA, the measure of recovery is "the damages . . . [that] flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received. . . .": Michigan Cent. R. Co. v. Vreeland, *supra,* 227 US, at 70, 57 L Ed 417, 33 S Ct 192. The amount of money that a wage earner is able to contribute to the support of his family is unquestionably affected by the amount of the tax he must pay to the Federal Government. It is his after-tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family. It follows inexorably that the wage earner's income tax is a relevant factor in calculating the monetary loss suffered by his dependents when he dies.

Although federal courts have consistently received evidence of the amount of the decedent's personal expenditures, see, e.g., Kansas City Southern R. Co. v. Leslie, 238 US 599, 604, 59 L Ed 1478, 35 S Ct 844, and have required that the estimate of future earnings be reduced by "taking account of the earning power of the money that is presently to be awarded." Chesapeake and Ohio v. Kelly, 241 US 485, 489, 60 L Ed 1117, 36 S Ct 630, they have generally not considered the payment of income taxes as tantamount to a personal expenditure and have

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[6] "The Supreme Court of the United States has not spoken on this issue. Absent an authoritative pronouncement by that Court we will follow the decisions of our own supreme Court in Raines v. New York Central R. R. Co. (1972), 51 Ill 2d 428, 430, 283 NE2d 230, cert denied (1972), 409 US 983, [34 L Ed 2d 247, 93 S Ct 322], and Hall v. Chicago & North Western Ry. Co. (1955), 5 Ill 2d 135, 149-52, 125 NE2d 77...." 62 Ill App 3d, at 668-669, 378 NE2d at 1245.

regarded the future prediction of tax consequences as too speculative and complex for a jury's deliberations. See, e.g., Johnson v. Penrod Drilling Co., 510 F2d 234, 236-237 (CA5 1975), cert denied, 423 US 839, 46 L Ed 2d 58, 96 S Ct 68, 96 S Ct 69.

[5a] Admittedly there are many variables that may affect the amount of a wage earner's future income tax liability. The law may change, his family may increase or decrease in size, his spouse's earnings may affect his tax bracket, and extra income or unforseen deductions may become available. But future employment itself, future health, future personal expenditures, future interest rates, and future inflation are also matters of estimate and prediction. Any one of these issues might provide the basis for protracted expert testimony and debate. But the practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the essential elements of an expert calculation in a form that is understandable by juries that are increasingly familiar with the complexities of modern life. We therefore reject the notion that the introduction of evidence describing a decedent's estimated after-tax earnings is too speculative or complex for a jury.[7]

Respondent argues that if this door is opened, other equally relevant evidence must also be received. For example, she points out that in discounting the estimate of future earnings to its present value, the tax on the income to be earned by the damage award is now omitted.[8] Logically, it would certainly seem cor-

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[7] **[5b]** This is not to say, however, that introduction of such evidence must be permitted in every case. If the impact of future income tax in calculating the award would be de minimis, introduction of the evidence may cause more confusion that it is worth. Cf. Fed Rule Evid 403.

[8] See McWeeney v. New York, N. H. & N. R. Co., 282 F2d 34, 37 (CA2 1960), cert denied, 364 US 870, 5 L Ed 2d 93, 81 S Ct 115.

rect that this amount, like future wages, should be estimated on an after-tax basis. But the fact that such an after-tax estimate, if offered in proper form, would also be admissible does not persuade us that it is wrong to use after-tax figures instead of gross earnings in projecting what the decedent's financial contributions to his survivors would have been had this tragic accident not occurred.

[6] Respondent also argues that evidence concerning costs of litigation, including her attorneys' fees, is equally pertinent to a determination of what amount will actually compensate the survivors for their monetary loss. In a sense this is, of course, true. But the argument that attorneys' fees must be added to a plaintiff's recovery if the award is truly to make him whole is contrary to the generally applicable "American Rule." See Alyeska Pipeline Co. v. Wilderness Society, 421 US 240, 247, 44 L Ed 2d 141, 95 S Ct 1612. The FELA, however, unlike a number of other federal statutes,[9] does not authorize recovery of attorneys' fees by the successful litigant. Only if the Congress were to provide for such a recovery would it be proper to consider them. In any event, it surely is not proper for the Judiciary to ignore the demonstrably relevant factor of income tax in measuring damages in order to offset what may be perceived as an undesirable or unfair rule regarding attorneys' fees.[10]

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[9] See Civil Rights Act of 1964, Tit VII, § 706(k), 78 Stat 261, 42 USC § 2000e-5(k) [42 USCS § 2000e-5(k)]; Clayton Act § 4, 36 Stat 731, 15 USC § 15 [15 USCS § 15]; and numerous others collected in Alyeska Pipeline Co. v. Wilderness Society, *supra,* 421 US, at 260-261, n 33, 44 L Ed 2d 141, 95 S Ct 1612.

[10] The dissent takes the position that § 104(a)(2) of the Internal Revenue Code, see nn 11-12, *infra,* which makes personal injury awards nontaxable, "appropriates for the tortfeasor a benefit intended to be conferred on the victim or his survivors." Post, at —, 62 L Ed 2d 697. But we see nothing in the language and are aware of nothing in the legislative history of § 104(a)(2) to suggest that it has any impact whatsoever on the proper measure of damages in a wrongful death action. Moreover, netting out the taxes that the decedent would have paid does not confer a benefit on the tortfeasor any more than netting out the decedent's personal expenditures. Both subtractions are re-

II

[2b] Section 104(a)(2) of the Internal Revenue Code provides that the amount of any damages received on account of personal injuries is not taxable income.[11] The section is construed to apply to wrongful death awards; they are not taxable income to the recipient.[12]

Although the law is perfectly clear, it is entirely possible that the members of the jury may assume that a plaintiff's recovery in a case of this kind will be subject to federal taxation, and that the award should be increased substantially in order to be sure that the injured party is fully compensated. The Missouri Supreme Court expressed the opinion that "it is reasonable to assume that many jurors will believe [that its verdict will] be subject to such taxes." Dempsey v. Thompson, 363 Mo 339, 346, 251 SW2d 42, 45 (1952). And Judge Aldisert, writing for the Third Circuit, agreed:

> "We take judicial notice of the 'tax consciousness' of the American public. Yet, we also recognize, as did the court in Dempsey v. Thompson, 363 Mo 339, 251 SW2d 42 (1952), that few members of the general public are aware of the special statutory exception for personal injury awards contained in the Internal Revenue Code.

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quired in order to determine "the pecuniary benefits which the beneficiaries might have reasonably received. . . ." Michigan Cent. R. Co. v. Vreeland, *supra,* 227 US, at 70, 57 L Ed 417, 33 S Ct 192.

[11] The statute contains an exception for the reimbursement of medical expenses that have been taken as a deduction. The section provides in relevant part:

"Except in the case of amounts attributable to (and not in excess of) deductions allowed under Section 213 (relating to medical, etc., expense) for any prior taxable year, gross income does not include—. . . (2) the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness. . . ."

[12] See Rev Rul 54-19, 1954-1 Cum Bull 179.

> " '[T]here is always danger that today's tax-conscious juries may assume (mistakenly of course) that the judgment will be taxable and therefore make their verdict big enough so that plaintiff would get what they think he deserves after the imaginary tax is taken out of it.'
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> "H. Harper & James, The Law of Torts § 25.12, at 1327-1328 (1956)." (Footnote omitted.) Domeracki v. Humble Oil & Refining Co., 443 F2d 1245, 1251 (CA3 1971), cert denied, 404 US 883, 30 L Ed 2d 165, 92 S Ct 212.

A number of other commentators have also identified that risk.[13]

In this case the respondents' expert witness computed the amount of pecuniary loss at $302,000, plus the value of the care and training that decedent would have provided to his young children; the jury awarded damages of $775,000. It is surely not fanciful to suppose that the jury erroneously believed that a large portion of the award would be payable to the Federal Government in taxes and that therefore it improperly inflated the recovery. Whether or not this speculation is accurate, we agree with petitioner that, as Judge Ely wrote for the Ninth Circuit,

> "To put the matter simply, giving the instruction can do no harm, and it can certainly help by preventing the jury from inflating the award and thus overcompensating the plaintiff on the basis of an erroneous assumption that the judgment will be taxable." Burlington Northern, Inc. v. Boxberger, 529 F2d 284, 297 (CA9 1975).

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[13] See, e.g., Burns, A Compensation Award for Personal Injury or Wrongful Death is Tax Exempt: Should We Tell the Jury?, 14 DePaul L Rev 320 (1965); Feldman, Personal Injury Awards: Should Tax Exempt Status Be Ignored?, 7 Ariz L Rev 272 (1966); Nordstrom, Income Taxes and Personal Injury Awards, 19 Ohio St LJ 212 (1958).

We hold that it was error to refuse the requested instruction in this case. That instruction was brief and could be easily understood. It would not complicate the trial by making additional qualifying or supplemental instructions necessary. It would not be prejudicial to either party, but would merely eliminate an area of doubt or speculation that might have an improper impact on the computation of the amount of damages.

The judgment is reversed and the case is remanded to the Appellate Court of Illinois for further proceedings consistent with this opinion.

It is so ordered.

Separate Opinion

Mr. Justice **Blackmun,** with whom Mr. Justice **Marshall** joins, dissenting.

In this action for wrongful death arising under the Federal Employers' Liability Act, 35 Stat 65, as amended, 45 USC §§ 51-60 [45 USCS §§ 51-60], the Court today holds that if an award is granted, federal income taxes on the decedent's lost earnings are to be taken into account and are to reduce the amount of the award. The Court further holds that, on request, the jury must be instructed that the award is not subject to federal income tax.

I agree with neither ruling. In my view, by mandating adjustment of the award by way of reduction for federal income taxes that would have been paid by the decedent on his earnings, the Court appropriates for the tortfeasor a benefit intended to be conferred on the victim or his survivors. And in requiring that the jury be instructed that a wrongful death award is not subject to federal income tax, the Court opens the door for a variety of admonitions to the jury not to "misbehave," and unnecessarily interjects what is now to be federal law into the administration of a trial in a state court.

In this day of substantial income taxes, one is sorely tempted, in jury litigation, to accept the propriety of admitting evidence as to a tort victim's earnings *net* after estimated income taxes, and of instructing the jury that an award will be tax-free. This, it could be urged, is only common sense and a recognition of financial realities.

Ordinarily, however, the effect of an income tax upon the recipient of a payment is of no real or ultimate concern to the payer. Apart from required withholding, it just is not the payer's responsibility or, indeed, "any of his business." The concept of "net after taxes" and the omnipresence of the tax collector, to be sure, are present facts of life and are within the constant awareness of both recipient and payer. But these factors do not change the basic character of an award for damages, whether that award be one to compensate the surviving victim for his injury, or one to compensate the deceased victim's survivors, by way of statutory wrongful death benefit, for their loss. The income tax effect should flow and be retained in its own channel. Surely, it should not operate to assist the tortfeasor by way of a benefit, perhaps even a windfall.

I

The employer-petitioner argues, and the Court holds, that federal income taxes that would have been paid by the deceased victim must be subtracted in computing the amount of the wrongful death award. Were one able to ignore and set aside the uncertainties, estimates, assumptions, and complexities involved in computing and effectuating that subtraction, this might not be an unreasonable legislative proposition in a compensatory tort system. Neither petitioner nor the Court, however, recognizes that the premise of such an argument is the nontaxability, under the Internal Revenue Code, of the wrongful death award itself.

By not taxing the award, Congress has bestowed a benefit.[1] Although the parties disagree over the origin of the tax-free status of the wrongful death award,[2] it is surely clear that the lost earnings could be taxed as income. Cf. Commissioner v. Glenshaw Glass Co., 348 US 426, 430-431, 99 L Ed 483, 75 S Ct 473 (1955). See, generally, M. Chirelstein, Federal Income Taxation 39-40 (1977). In my view, why Congress created this benefit under one statute is relevant in deciding where the benefit should be allocated under another statute enacted by Congress.[3]

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[1] The parties agree that these awards are not taxable. Of course, it would not be in the interest of either party to take the position that the award is taxable.

[2] Respondent maintains that a wrongful death award is within the exclusion of § 104(a)(2) of the Internal Revenue Code of 1954, 26 USC § 104(a)(2) [26 USCS § 104(a)(2)], which provides that "gross income does not include . . . the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness." Brief for Respondent 8-9, and n 2. Petitioner, on the other hand, contends that a wrongful death award is not, in the words of the statute, "received . . . on account of personal injuries." Petitioner points to an early ruling that wrongful death damages are not within the Code's definition of income because they merely replace contributions the decedent's relatives would have received from the decedent. IT 2420, VII-2 Cum Bull 123 (1928): see Rev Rul 54-19, 1954-1 Cum Bull 179. Alternatively, petitioner argues that even if wrongful death damages are covered by § 104(a)(2), Congress' purpose in enacting that subsection was not to aid tort victims. Rather, § 104(a)(2) can be traced to Congress' concern in 1918 that personal injury damages were not income within the meaning of the Sixteenth Amendment, citing HR Rep No. 767, 65th Cong, 2d Sess, 9-10 (1918). Brief for Petitioner 31-32, n 23.

[3] Petitioner argues that a decision in this case that would rest on Congress' purpose not to subject wrongful death awards to federal income taxation would "fundamentally alter all forms of injury compensation in this country," Reply Brief for Petitioner 10-11, since this nontaxability is not limited to awards under the FELA. My position, however, is merely that the policies embodied in one federal statute are relevant in aid of the interpretation of another federal statute. Absent a more explicit statement of Congress' intent, I would not infer a congressional purpose to override the States' traditional power to define the measure of damages applicable to state-created causes of action.

While Congress has not articulated its reasons for not taxing a wrongful death award, it is highly unlikely that it intended to confer this benefit on the tortfeasor. Two more probable purposes for the exclusion are apparent. First, taxing the award could involve the same uncertainties and complexities noted by respondent and the majority of the courts of this country as a reason for not taking income taxes into account in computing the award. Congress may have decided that it is simply not worthwhile to enact a complex and administratively burdensome system in order to approximate the tax treatment of the income if, in fact, it had been earned over a period of time by the decedent. Second, Congress may have intended to confer a humanitarian benefit on the victim or victims of the tort. One District Court has reasoned:

> "The court can divine no societal purpose that would be furthered by awarding wrongdoing defendants with the benefit of this Congressional largesse. A societal purpose would be served by benefiting innocent victims of tortious conduct. Indeed, since the victims' chances of needing public relief are thereby diminished, this concern would be greater, not less, in the case of death, where the loss of earning capacity is total. This court therefore concludes that Congress, as with all exemptions under Section 104, '. . . intended to relieve a taxpayer who has the misfortune to become ill or injured. . . .' " Huddell v. Levin, 395 F Supp 64, 87 (NJ 1975),[4] quoting Epmeier v. United States, 199 F2d 508, 511 (CA7 1952), quoted in turn in Haynes v. United States, 353 US 81, 84, n 3, 1 L Ed 2d 671, 77 S Ct 649 (1957).

See also Comment, Income Tax Effects on Personal Injury Recoveries, 30 La L Rev 672, 685 (1970); Note, 69 Harv L Rev 1495, 1496 (1956); Note, Taxation of Damage Recoveries from Litigation, 40 Cornell LQ 345, 346 (1955).

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[4] Vacated on other grounds, 537 F2d 726 (CA3 1976).

Whichever of these concerns it was that motivated Congress, transfer of the tax benefit to the FELA tortfeasor-defendant is inconsistent with that purpose. If Congress felt that it was not worth the effort to estimate the decedent's prospective tax liability on behalf of the public fisc, it is unlikely that it would want to require this effort on behalf of the tortfeasor. And Congress would not confer a humanitarian benefit on tort victims or their survivors in the Internal Revenue Code, only to take it away from victims or their survivors covered by the FELA. I conclude, therefore, that any income tax effect on lost earnings should not be considered in the computation of a damages award under the FELA.

II

The Court concludes that, as a matter of federal law, the jury in an FELA case must be instructed, on request, that the damages award is not taxable. This instruction is mandated, it is said, because "it is entirely possible that the members of the jury may assume that a plaintiff's recovery . . . will be subject to federal taxation, and that the award should be increased substantially in order to be sure that the injured party is fully compensated." Ante, at —, 62 L Ed 2d 695, The Court finds it "surely not fanciful to suppose" that the jury acted on that assumption in this case. Ante, at — - —, 62 L Ed 2d 696.

The required instruction is purely cautionary in nature. It does not affect the determination of liability or the measure of damages. It does nothing more than call a basically irrelevant factor to the jury's attention, and then directs the jury to forget that matter. Even if federal law governed such an admonition to the jury not to misbehave, the instruction required by the Court seems to me to be both unwise and unjustified, and almost an affront to the practical wisdom of the jury.

It also is "entirely possible" that the jury "may" increase its damages award in the belief that the defendant is insured, or

that the plaintiff will be obligated for substantial attorney's fees, or that the award is subject to state (as well as federal) income tax, or on the basis of any number of other extraneous factors. Charging the jury about every conceivable matter as to which it should not misbehave or miscalculate would be burdensome and could be confusing. Yet the Court's desicion today opens the door to that possibility. There certainly is no evidence in this record to indicate that the jury is any more likely to act upon an erroneous assumption about an award's being subject to federal income tax than about any other collateral matter. Although the Court suggests that the difference in the expert's estimation of the pecuniary loss and the total amount of the award represents inflation of the award for federal income taxes, ante, at — - —, 62 L Ed 2d 696, this is pure surmise. The jury was instructed that it could compensate for factors on which experts could not place a precise dollar value, and it is "entirely possible" that these, instead, were the basis of the award.

In any event, it has long been settled that the giving of cautionary instructions is governed by state law when an FELA action is brought in state court. "[Q]uestions or procedure and evidence [are] to be determined according to the law of the forum [in cases arising under the FELA]." Chesapeake & Ohio R. Co. v. Kelly, 241 US 485, 491, 60 L Ed 1117, 36 S Ct 630 (1916). This Court, to be sure, has asserted federal control over a number of incidents of state trial practice that might appear to be procedural, and has done so out of concern, apparently, for protecting the rights of FELA plaintiffs. See, e.g., Brown v. Western R. of Alabama, 338 US 294, 94 L Ed 100, 70 S Ct 105 (1949) (a State cannot apply, in an FELA case, its usual rule that pleadings are construed against the pleader); Dice v. Akron, C. & Y. R. Co., 342 US 359, 96 L Ed 398, 72 S Ct 312, 47 Ohio Ops 53, 63 Ohio L Abs 161 (1952) (FELA plaintiff is entitled to a jury trial in state court notwithstanding a contrary state rule); C. Wright, Law of Federal Courts 195-196 (3d ed 1976); Hill,

Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?, 17 Ohio St LJ 384 (1956). I agree, of course, that state rules that interfere with federal policy are to be rejected, even if they might be characterized as "procedural." See, e.g., Note, State Enforcement of Federally Created Rights, 73 Harv L Rev 1551, 1560-1561 (1960). See generally Note, Procedural Protection for Federal Rights in State Courts, 30 U Cin L Rev 184 (1961). I cannot conclude, however, that a purely cautionary instruction to the jury not to misbehave implicates any federal interest. This issue truly can be characterized as one of the "ordinary incidents of state procedure," Dickinson v. Stiles, 246 US 631, 633, 62 L Ed 908, 38 S Ct 415 (1918), which should be governed by state law.

Since the law of Illinois, where this case arose, is that it is not error to refuse to instruct the jury as to the nontaxability of the award, Raines v. New York Central R. Co., 51 Ill 2d 428, 430, 283 NE2d 230, 232, cert denied, 409 US 983, 34 L Ed 2d 247, 93 S Ct 322 (1972), and since I believe the trial court correctly excluded evidence of the prospective tax liability of the deceased victim, I would affirm the judgment of the Appellate Court of Illinois.

EXHIBIT "I"

Section 104(a)(2) of the Internal Revenue Code provides, and numerous court decisions thereunder hold, that damage awards for personal injuries or wrongful death are tax-exempt. The "probable purposes for the exclusion" are persuasively spelled out in the dissenting opinion. (pp. 3-4). Responding to that contention, the majority states, (ft, nt. 10):

> "But we see nothing in the language and are aware of nothing in the legislative hisotry of §104(a)(2) to suggest that it has any impact whatsoever on the proper measure of damages in a wrongful death action. Moreover, netting out the taxes that the decedent would have paid does not confer a benefit on the tortfeasor, any more than netting out the decedent's personal expenditures. Both subtractions are required in order to determine the 'pecuniary benefits which the beneficiaries might have reasonably received...' " (Opin. p. 6).

The short answer to the majority's argument is that in the one case Congress mandated that taxes should not be "netted out" in the case of a damage award against the tortfeasor, whereas the FELA requires the "netting out of decedent's personal expenditures."

V.

The ruling of the Court should be prospective Only.

The Court may take judicial notice that literally hundreds, if not thousands, of FELA cases are currently pending in various jurisdictions throughout the United States. Undeniably those cases were tried in reliance upon the rule prevailing in a majority of jurisdictions.

If the instant opinion stands in its present form, the decision will force remands of *all* of those cases. The expense and inconvenience to innumerable parties will be enormous.

In these circumstances respondent respectfully suggests that the Court apply the rule of *Great Northern Ry. Co.* v. *Sunburst Oil Co.*, 287 U.S. 358, 53 S. Ct. 145 (1932), and *Linkletter* v. *Walker*, 381 U.S. 318, 85 S. Ct. 1731 (1965). As noted in *Linkletter*, the prospective ruling should not even apply to the immediate parties before the Court, otherwise the ruling will govern all other cases pending on appeal. (381 U.S. at 621-622).

See also *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S. Ct. 461 (1964) and *James* v. *United States*, 366 U.S. 213, 81 S. Ct. 1052.

In this connection it should also be noted, and in support of its holding that a cautionary income tax instruction be given, Mr. Justice Stevens cites *Dempsey* v. *Thompson*, 363 Mo. 339, 231 S.W.2d 42 (1952) and *Domerackie* v. *Humble Oil & Refining Co.*, 443 F.2d 1245 (3rd Cir. 1971). (Opin. p. 7).

Significantly, in each of those two cases the Court held that the rule there adopted was to be given *prospective effect* only and not to be applied to the parties before the Court. Simple justice and equity require similar treatment in the case at bar.* A prospective application of the instant decision would help preserve the orderly administration of justice in 34 States, 5 Federal Circuits and the District of Columbia, all of whom follow the "gross earnings" rule, and exclude customary instruction on income tax impact.

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* In 1B Moore *Federal Practice*. ¶0.402 (2nd Ed. 1974). Professor Moore suggests that two factors should be considered: where there has been a justifiable reliance upon the old rule and the impact of a retroactive application of a new rule, both on litigants and on the administration of justice as a whole.

In the case at bar the majority commences its opinion with the observation that, "most trial judges refuse to allow the jury to receive evidence or instructions concerning the impace of federal income taxes on the amount of damages to be awarded," (Opin. 1). Since the rule against giving such instructions has been widely and almost universally applied prior to the decision here other than a prospective application, will be greatly detrimental to many litigants.

The remaining matter of advising the jury as to the taxfree status of any award, is a cautionary, procedural instruction. Notwithstanding Justice Stewart's inquiry during oral argument, no case, State or Federal, has ever been reversed *solely* on the ground of failure to give such instruction. The *Boxberger* decision reversed on two grounds: failure to admit evidence of future taxes and refusal to give the tax-free cautionary instruction. If *Boxberger* had involved only the single issue of failure to give the instruction, it can be confidently assumed that there would have been no reversal, but a ruling for prospective effect exactly as has bene done in *every* jurisdiction in this country prior to the instant decision. Respondent respectfully asks that the same prospective application of the instruction rule be accorded her.

No. 80-1094

IN THE

Supreme Court of the United States

October Term, 1980

BURLINGTON NORTHERN, INC., a corporation,
Petitioner,

vs.

EDWARD L. FLANIGAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The order of the Court of Appeals is printed in the petition appendix at A-1 through A-19; the opinion is reported at 632 F.2d 880 (8th Cir. 1980).

JURISDICTION

The judgment of the Court of Appeals was entered September 4, 1980, and an order denying rehearing and rehearing en banc was entered October 16, 1980. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Court of Appeals correctly concluded that it was harmless error in this FELA case for the District Court not to have given a non-taxability jury instruction.

STATUTES AND RULES INVOLVED

Certain statutes are set out in the petition at 2-3. In addition, 28 U.S.C. §2111, entitled "Harmless Error" is relevant. It provides:

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

And Fed. R. Civ. P. 61, also entitled "Harmless Error,' is relevant. It provides:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

STATEMENT

The facts are fully developed in the opinion of the Court of Appeals. Pet. Appendix, A-1 through A-19; 632 F.2d 880 (8th Cir. 1980).

ARGUMENT

1. *There is no conflict among Courts of Appeals on the applicability of Liepelt to cases on appeal at the time it was decided.* Resolving a long-standing conflict among Courts of Appeals, this Court, in February, 1980 held that it was error not to give a requested instruction that FELA awards were non-taxable. *Norfolk v. Western Ry. v. Liepelt,* — U.S. —, 100 S. Ct. 755, 62 L.Ed.2d 698 (1980). The case was for wrongful death; plaintiff's expert put the future loss at $302,000.00 and the jury awarded $775,000.00. This Court said, "We hold that it was error to refuse the requested instruction in this case" and remanded for "further proceedings consistent with this opinion." Pet. A-36.

Petitioner admits that the Court of Appeals did apply the new *Liepelt* law to cases pending on appeal when that decision was announced. Pet. 5-6; 632 F.2d at 887. But petitioner claims that the way *Liepelt* was applied by the Eighth Circuit creates a conflict with the Fourth and Fifth Circuits and other courts. Pet. 8-11. Specifically, petitioner contends that the Court of Appeals for the Eighth Circuit "engrafted" a harmless error rule onto the *Liepelt* decision. Pet. 9.

There is no true conflict. The case from the United States Court of Appeals for the Fifth Circuit, *Lange v. Texas & Pacific Ry. Co.,* 624 F.2d 1275 (5th Cir. 1980) is easily distinquished. That was a wrongful death action where the jury awarded $913,000.00 and the District Court remitted to $600,000.00. The case is virtually identical to *Liepelt*. There was no harmless error because the verdict was so high that one could reasonably suspect that the jury erroneously thought the award was taxable.

That is exactly what this Court did in *Liepelt*, Pet., A-35; see also, A-40-41, Blackmun, J. dissenting. In *Lange*, unlike the present case, it was clear that the jury was operating under some misconception because the verdict greatly exceeded the damage evidence of plaintiff's own economist.

The case from the United States Court of Appeals for the Fourth Circuit, *Cazad v. Chesapeake & Ohio Railway Co.*, 622 F.2d 72 (4th Cir. 1980) is also distinguishable. It was an injury action but the injuries to the plaintiff were not described in detail. There is no discussion of harmless error. It is not unreasonable to suspect that the plaintiff obtained a generous verdict and, therefore, conceded that any error was not harmless.

More importantly, neither case disavows the applicability of the harmless error rule to these cases. Indeed, since the rule is based on statute, 28 U.S.C. §2111, and a rule of civil procedure, Fed. R. Civ. P. 61, it cannot so easily be dislodged. Finally, it is wrong to say that this Court's *Liepelt* decision mandates vacation of all verdicts where a non-taxability instruction was refused. This Court merely said that "it was error to refuse the requested instruction *in this case*." A-36. (emphasis added).

2. *The application of "harmless error" by the Court of Appeals here is based on statute, rule and caselaw.* Without even citing the controlling statute or rule regarding "harmless error" petitioner argues that application of the doctrine here is totally without precedent. Pet. 8, passim. In fact, long-standing caselaw supports the Eighth Circuit's conclusion.

The Court of Appeals described the pain and suffering associated with the loss of respondent's leg noting that

it was an element of damages "in addition to being compensated for loss of future income." Pet. App., A-18; 632 F. 2d at 890. The Court concluded the $500,000.00 verdict was not based on an erroneous impression of non-taxability:

> "Consi ering plaintiff's pain and suffering, his medical expenses as well as his loss of earning potential, the verdict does not indicate that the jury erroneously speculated that plaintiff's award would be subject to income tax." *Id.*

The decision is a routine application of Fed. R. Civ. P. 61 to an erroneous failure to give a jury instruct on regarding damages.

Under 28 U.S.C. §2111, Courts of Appeals "shall give judgment after an examination of the record without regard to errors . . . which do not affect the substantial rights of the parties." That section is mandatory and envisions exactly the inquiry made by the Eighth Circuit here.

Contrary to petitioner's contention that the Eighth Circuit "engrafted" the harmless error rule on *Liepelt*, courts of appeals for years have applied it to erroneous failures to give damage instructions. The key has always been that a verdict was not excessive. E. g., *Guido v. Hudson Transit Lines, Inc.*, 178 F.2d 740 (3rd Cir. 1950); *Huse v. Consoidated Freightways, Inc.*, 227 F.2d 425 (7th Cir. 1956); *Biggans v. Hajoca Corp.*, 18 F.2d 982 (3rd Cir. 1951).

A classic example of such application is *Brett v. United States*, 86 F.2d 305 (9th Cir. 1936), *cert. denied*, 301 U.S. 682, 81 L.Ed. 1340, 575 Ct. 732, where the failure

to give a defendant's damage instruction in a condemnation case was held to be harmless error because there was no indication that the jury erroneously increased the value. (Applying Section 2111).

Moreover, the rule has long been applied in FELA cases where the District Court erroneously failed to give a non-taxability instruction. *McWeeney v. New York, N. H. & H. R. Co.*, 282 F.2d 34 (2d Cir. 1960) (requiring evidence that the jury erroneously increased the recovery before failure to give the instruction would be reversible.); *Domeracki v. Humble Oil & Ref. Co.*, 443 F.2d 1245, 1252 and n. 15 (3rd Cir. 1971); *Cullinan v. Burlington Northern, Inc.*, 522 F.2d 1034 (9th Cir. 1975); *Burlington Northern, Inc. v. Boxberger*, 529 F.2d 284, 296 and n. 15 (9th Cir. 1975).

Finally, the two courts of appeals that petitioner contends are in conflict here, the Fourth Circuit and the Fifth Circuit, actually are in agreement with the Eighth Circuit that the harmless error rule applies to failures to give jury instructions regarding damages. E. g., *Smith v. Brady*, 390 F.2d 176 (4th Cir. 1968); *Wallace v. Ener*, 521 F.2d 215 (5th Cir. 1975); see also, *Gillentine v. McKeand*, 426 F.2d 717 (1st Cir. 1970).

3. *The issue here is not a proper subject for plenary review.* There are two significant reasons why this Court should not expend its limited time to review this case. First, the issues will not arise again. All of the cases petitioner alleges conflict with this case, and this case itself, have one thing in common: they were on appeal when *Liepelt* was decided. The number of cases involved is few and they will not arise again.

In the future, defendants in FELA cases will request the non-taxability instruction, citing *Liepelt;* trial courts will give the instruction on that authority. Never again will the question arise whether it was harmless error not to give the non-taxability instruction.

Second, application of the harmless error rule inevitably involves a fact-specific inquiry on a case-by-case basis. And application of the rule is part of the error correcting function of the courts of appeals. This Court must, as a matter of sound administration of justice, leave that task to those courts. The question of whether the harmless error rule was correctly applied in any one case is not a question of law for this Court.

CONCLUSION

Absent from the petition is any contention that the award was excessive. That is because the award was fair and reasonable for the pain and suffering, loss of past and future income and disability suffered by respondent. The jury simply did not inflate its award assuming it to be taxable. The failure to give the instruction was harmless.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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